TEOH HOOI LEONG

v.

BAR COUNCIL

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[SC CIVIL APPEAL NO. 02-19-90]
27 MARCH 1991

LEGAL PROFESSION: *Application for restoration of name to Roll - No objection by Bar Council - Fit and proper person - Onus - Discretion of Court - Exceptional circumstances test - Fair and reasonable test - Material considerations - Lapse of time - Reasonable decision - Cogent evidence - Collective view of Bar Council - Notice of motion to be served on Bar Council - Legal Profession Act 1976, ss. 103, 107*

This was an appeal by the appellant, T, to have his name restored to the Roll of Advocates and Solicitors of the High Court of Malaya under s. 107 of the Legal Profession Act 1976 (the Act). T had been convicted of criminal breach of trust under s. 409 of the Penal Code.

The High Court had refused T's application as it was of the view that T had not discharged the onus of proving that he was a "fit and proper person" nor had he shown exceptional circumstances as required by the Act; the High Court also found that although T at all times was earning a substantial salary from the various companies he was employed with, he had failed to make proper restitution to his creditors over the years. The Bar Council did not object to T's application.

This judgment discusses the principles which should be applied by the Courts in considering applications under s. 107 of the Act and the clarification as to the proper party to be served with the notice of motion under s. 107.

Held:

[1] It was erroneous of the High Court to apply the exceptional circumstances test as an absolute test - the Court must decide whether the applicant is a fit and proper person and must do so according to what is fair and reasonable. The decision of the Court must be fair

(a) to members of the public with whom the applicant will be renewing professional relations;

(b) to the profession and colleagues in the profession;

(c) to the Court as the applicant, if readmitted, will be an officer of the Court and

(d) to the applicant

[2] The lapse of time since the conviction is a material consideration and if an advocate and solicitor lives a blameless life and there is evidence of rehabilitation and there are members of the profession who can vouch to this change, that may overcome the initial misconduct.

[3] In this case, there is no evidence that T has committed any irregularity during the last 14 years and the lapse of 14 years from the date of breach to the date of application for readmission was a factor in T's favour.

[4] Section 107 requires that a reasonable decision be made and such a decision must be supported by cogent evidence. In this case, the High Court, by calling the official assignee (O.A.) as *amicus curiae*, had gone behind the earlier order of discharge and report of the O.A. and drew unfavourable inferences against T - this was not a reasonable decision as it was not based on cogent evidence properly received and subject to cross-examination.

[5] In T's application, the view of the Bar Council should be regarded as the collective view of the profession as the views expressed in the testimonials are the views of his peers; although the opinion of the Bar Council or the senior members of the profession as expressed in the testimonials should not in any way be substituted for the view of the Court, if the Bar Council and members of the profession feel that an applicant should be restored to the Roll, and this view is not inconsistent with the other materials before the Court, the burden on the Court is less onerous and much of the foundation for disinclination to entertain the application is gone.

[6] Considering all the circumstances of this case, it was fair and reasonable to allow T's name to be restored to the Roll.

[7] Under ss. 103 and 107 of the Act, the notice of motion under s. 107 of the Act shall be served to the Bar Council who shall be represented at the hearing of the motion and which will place before the Court a report of the proceedings which resulted in the name of the applicant being struck off from the Roll.

[Appeal allowed; Order of High Court set aside and T's name to be restored to the Roll.]

Cases referred to:
Chan Chow Wang v. Malaysian Bar [1986] 2 MLJ 159
Coghan v. Cumberland [1898] 1 Ch D 704
Ex parte Clyne [1962] SR (NSW) 436
Ex parte Lenehan [1948] 77 CLR 403
F.E. Maddocks Cohen [1956] 73 WN (NSW) 126
Re Chin Swee Oon [1964] 30 MLJ 124
Re Kearney [1908] 8 SR (NSW) 87
Re Lim Cheng Peng [1988] 1 MLJ 231

Legislation referred to:
Legal Profession Act 1976, ss. 103, 107
Legal Profession Act [Sing], s. 99
Penal Code, s. 409

For the appellant - R.R. Sethu (Christina Chia with him); M/s. Christina Chia, Ng & Partners
For the respondent - Bharti Seth (Maidzura Mohammad with her); M/s. Shearn & Delamore

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

This was an appeal by Teoh Hooi Leong, an applicant under s. 107 of the Legal Profession Act 1976 (the Act) against the decision of the High Court refusing his application to have his name restored to the Roll of Advocates and Solicitors of the High Court Malaya.

Under s. 107 of the Act the High Court, consisting of three Judges, may if it thinks fair and reasonable so to do, restore to the Roll the name of the advocate and solicitor which has been removed from or struck off the Roll. Any party aggrieved by the decision of the High Court under this section has a right of appeal to this Court.

The appellant was conferred the Degree of Bachelor of Laws (Honours) by the University of Singapore in 1966. He was admitted as an advocate and solicitor of the High Court Malaya on 27 June 1967 and was practising until October 1974. In 1974 he was charged with two counts of criminal breach of trust of RM99,240 under s. 409 of the Penal Code. He pleaded guilty to the charges and was sentenced to eighteen months imprisonment. However on appeal the sentence was reduced to three months imprisonment and a fine of RM2,000. He served the sentence and paid the fine.

In 1975 he was made a bankrupt. Also in 1975 he applied on his own initiative to have his name removed from the Roll. However due to some miscommunication the appellant's name remained in the Roll until 1989. From 1974 to 1987 the appellant did not practice but was employed by various companies assisting in legal advice but not in any managerial capacity. On 10 May 1989 the appellant gave notice to the Bar Council of his intention to make an application to be restored to the Roll. The Bar Council wrote to him on 14 June 1989 to state that it would not object to the application.

Section 107(1) of the Act states as follows:

> The High Court may, if it thinks **fair and reasonable**, at any time order the Registrar to restore to the Roll the name of an advocate and solicitor which has been removed from, or struck off, the Roll.

The High Court's refusal to allow the application of the appellant was grounded basically on what appeared to be its view that the appellant had not discharged the onus that he was a "fit and proper person" and that he had not shown exceptional circumstances. The reasoning of the High Court is as expressed in paras. 29, 30 and 39 of the judgment following immediately after its observations on the increasing number of allegations of fraud against lawyers in this country:

> 29. To be called to the Bar one has to be "a fit and proper person". This is not just a cliche, and persons of standing who give such testimonials to aspirants to the profession would do well to make a very careful evaluation of the characters they are assisting to let loose on the Malaysian public.
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> 30. Where a solicitor has abused his trust by committing fraud in misappropriating client's moneys we consider that disbarment must follow as a matter of course. Such a person can only be reinstated to the Roll in the most exceptional circumstances.
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> 39. In conclusion we must emphasize that the Legal Profession should be perceived to be an honourable one. So where a solicitor has been disbarred for dishonourable conduct it is only in the most exceptional cases that he can be restored to the Roll. The onus on him to show he is now a fit and proper person is a very heavy one.

Among its findings material in the process of assessment by the High Court would seem to be its finding that although the appellant was earning a substantial salary at all material times from the various companies he had failed to make a proper restitution to his creditors over the years. Also material was its finding that the total sum misappropriated by the appellant was RM138,791 when in fact misappropriation related only to the sum of RM99,240 out of the total disclosed liability of RM450,957.10.

The appellant's debts were mostly unsecured gambling debts from individuals. Of this only a sum of RM153,812.29 was proved in bankruptcy. Notices of intended dividend were sent to fifteen unproved creditors amounting to RM286,586.90 but all the notices were returned undelivered. On 13 June 1988 the appellant obtained an order of discharge from bankruptcy.

What are the principles to be applied by the Court in considering an application under s. 107 of the Act?

It is a matter of public policy that a heavy burden should be imposed on an applicant under s. 107 of the Act to satisfy the Court that he is a fit and proper person to have his name restored to the Roll. This high standard required was observed and applied in *Chan Chow Wang v. Malaysian Bar* [1986] 2 MLJ 159 which is also an application under s. 107 of the Act. In that case the Court applied *Re Chin Swee Oon* [1964] 30 MLJ 124 for the principle that each case has to be decided on its own facts and decided that despite the objection from the Bar Council "it was fair and reasonable" to allow the name of the applicant to be restored to the Roll.

The corresponding Singapore law provides that "the Court may, if it thinks fit" restore the name of a solicitor (s. 99 of the Singapore Legal Profession Act) (Cap. 161). In both jurisdictions an exercise of discretion is involved.

In *Re Lim Cheng Peng* [1988] 1 MLJ 231 the applicant was also convicted under s. 409 of the Penal Code whereupon he was struck off the Roll in 1984. In 1987 he took out an originating motion to have his name restored. Wee Chong Jin CJ tabulated three matters connected with the discretion under the Singapore section namely:

(1) the Court may order restoration if it thinks fit; the discretion is conferred by the legislature which must of course be exercised judicially;

(2) there is no stipulation as to the period of time that must lapse between the date of the order striking the solicitor off the Roll and the date of his application for restoration to the Roll; and

(3) the Court must consider the views of the council of the Law Society of Singapore.

It is clear in the judgment of the Singapore case (at p. 233) that the lapse of time between the date of the order striking off the name of the applicant and the date of the application for restoration is a relevant consideration:

> We are of the view that unless there are exceptional circumstances, we would say that, as a general rule, no solicitor who has been struck off the roll ought to contemplate taking out an application under s. 99 of the Legal Profession Act before the expiration of five years from the date of the order of striking off.

In that case the Singapore Court however emphasised that the case turned entirely on its own special facts and in the light of all the circumstances the Court thought it fit though not without some hesitation, that the name of the applicant should be restored to the Roll.

In the instant case the High Court applied the exceptional circumstances test and held that the appellant had failed to discharge to onus. This is clearly shown in the paragraph reproduced earlier in the judgment.

We are of the view that it is erroneous to apply the exceptional circumstances test as an absolute test. We accept that there is an onus on the applicant under s. 107 of the Act to satisfy the Court that he is a fit and proper person to have his name restored to the Roll. But the operative words in law are "fair and reasonable", as also observed by Harun J (as he then was) in *Chan Chow Wang* that is, the Court must decide according to what is fair and reasonable. This means that the whole circumstances of the case must be considered.

The word "fair" must necessarily mean that the decision must be fair firstly to the members of the public with whom the applicant will be renewing professional relations once readmitted because the law seeks to protect not only the profession but also the public from errant lawyers.

The decision must also be fair to the profession and to his colleagues in the profession. The appellant here produced several letters from senior members of the legal profession exhibited at pp. 72 - 77. The Bar Council in its letter at p. 79 of the appeal record stated that it would not object to the application. The Bar Council did not object to the application before the High Court and maintained the same stance in the appeal before this Court. On 22 September 1989 in his report and statement of facts the President of the Malaysian Bar stated that the council had no reason to doubt the appellant's declaration of remorse and repentance and had no reason to doubt the expressions of opinion as to the appellant's character and fitness for readmission to the Roll.

The word "fair" also requires that the decision must be fair to the Court itself because when readmitted the appellant will be an officer of the Court.

Last but not least the decision must be fair to the appellant. True he was convicted under s. 409 of the Penal Code and by all counts it is a serious offence especially to an advocate and solicitor. True the Court must necessarily be disinclined to restore the name of an advocate and solicitor who had committed a misconduct and the onus of an applicant for admission under s. 107 of the Act is a heavy one. But the duty of the Court is to look at the circumstances and all the materials available to satisfy itself that an applicant has repented and reformed and there is a strong likelihood that he is not going to repeat the misconduct.

Ex parte Lenehan [1948] 77 CLR 403 laid down a general principle that in a case of this nature the Court must exercise its discretion in the light of all the circumstances of each particular case bearing in mind as pointed out by Rich J at p. 426:

> Solicitors are officers of the Court and the public expects that the Court will, so far as it can, ensure upright and honourable conduct on the part of its officers. The interests of the Court, the public, the profession and of the applicant must be considered (cf. In *re Kearney* [1908] 8 S.R. (N.S.W.) 87, at p. 89).

A person in the position of the appellant is in a sense put in a more disadvantageous position than an ordinary applicant seeking for admission into the Roll because in seeking for restoration to the Roll he must satisfy the Court not only that he is a fit and proper person to be restored but must displace the possible permanent unfitness which was the basis of his removal.

The Court should not however forget that once removed from the Roll it must not be construed that the door is shut forever to the lawyer. A conviction should not be regarded in every case as a permanent unfitness. Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his name restored to the Roll. The lapse of time since the conviction is thus a material consideration. It is true that there should be strong disinclination to readmit to the profession an advocate and solicitor who had been guilty of improper conduct. The principle that once a solicitor has been struck off the Roll for dishonesty he cannot be restored unless there are exceptional circumstances should no longer apply in absolute term. If an advocate and solicitor lives a blameless life and there is evidence that he has rehabilitated himself generally and there are members of the profession who can vouch to this change, that may overcome the initial misconduct. As stated in *Ex parte F.E. Maddocks Cohen* [1956] 73 W.N. (N.S.W.) 126:

> There must be a strong disinclination to admit to the profession of a solicitor any person who has been shown ever to have been guilty of improper conduct. It is a disinclination founded upon the safety of such a course and the need of strictness in maintaining the standards of the profession. But the false steps of youth and early manhood are not always final proof of defective character and unfitness. The presumption which, according to circumstances, they may appear to raise may surely be overcome by a subsequent blameless career.

There is no evidence that the appellant has committed any irregularity during the last 14 years. The lapse of 14 years from the date of the breach to the date of the application was a factor in favour of the appellant.

In *Ex parte Clyne* [1962] S.R. (N.S.W.) 436 Clyne was struck off the Roll by order of the Court dated 8 December 1959. Two years later he applied to be readmitted. The Court was not satisfied that he had undergone a whole-hearted change of attitude in that the Court felt that insufficient time had elapsed since the applicant's disbarment to justify the Court in readmitting him.

The duty of the Court in a case like this is to exercise its discretion having regard to the materials available before it and the particular facts of the case. The question should be seen as an exercise of discretion according to particular facts of the case. It should never be regarded as a principle laid down as a rule of law that an advocate and solicitor who has been struck off the Roll for dishonesty can never be reinstated.

Section 107 of the Act requires that the decision should also be a reasonable decision. A reasonable decision is a decision which is based on reasonable grounds. A reasonable decision must first of all be supported by cogent evidence and not one based on conjecture or speculation.

In a report to the Court under s. 33(3) of the Bankruptcy Act on 25 May 1988 the official assignee certified that no offence under the Bankruptcy Act had been committed by the appellant. On 13 June 1988 the appellant obtained a discharge from bankruptcy. The High Court, however, when hearing the application by the appellant called the official assignee as *amicus curiae* and enquired on the defaults by the appellant under s. 38 of the Bankruptcy Act relating to the requirement to render to the official assignee an account of all monies every six months. On the strength of the statement of the official assignee as *amicus curiae* the High Court went behind the order of discharge and the report of the official assignee as stated earlier and drew unfavourable inferences against the appellant. To be reasonable a decision must be based on cogent evidence properly received and subject to cross-examination.

This was an appeal on the exercise of discretion based on what is fair and reasonable. It was an appeal largely on how the Court should view and assess the relevant facts and circumstances of the case. The High Court had made up its own mind and gave its reasons in a written judgment. But that does not mean this Court is precluded from re-examining the materials available to the Court then. The principle to be applied is as stated in *Coghan v. Cumberland* [1898] 1 Ch. D 704 where in the judgment of the Court (Lindley MR, Rigby and Collins LJJ) the following appears:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong.

The burden of ensuring that the legal profession is safeguarded from errant members must be shared between the Court also as guardian of public interest, the Bar Council and members of the profession themselves. In the application by the appellant the view of the Bar Council should be regarded as the collective view of the profession. The views expressed in the testimonials are the views of his peers. Although the opinion of the Bar Council or the senior members of the profession as expressed in their testimonials should not in any way be substituted for the view of the Court, if the Bar Council and members of the profession themselves feel that an applicant should be restored to the Roll, and this view is not inconsistent with the other materials before the Court the burden on the Court is surely less onerous and much of the foundation for disinclination to entertain the application is gone.

In the final analysis the question here is simply whether on the materials available it is fair and reasonable for the Court to find that the appellant is a proper person to have his name restored to the Roll and it is not against the public interest to so order. Considering all the circumstances of the case it was certainly fair and reasonable to allow the appellant's name to be restored to the Roll.

The judgment of the High Court was accordingly set aside and we ordered that the name of the appellant be restored to the Roll. We however made no order as to costs.

At the conclusion of the hearing of the appeal Counsel appearing for the Bar Council wanted clarification as to who should be served with the notice of motion under s. 107 of the Act. The answer must be as what is found in s. 103 and s. 107 of the Act, that is, the notice of motion shall be served to the Bar Council who shall be represented at the hearing of the motion and who shall place before the Court a report which shall include copies of any report of the proceeding as a result of which the name of the applicant was removed or struck off from the Roll. There is no requirement to serve the notice of motion on any other person.

Also found at [1991] 2 CLJ 1117